



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1124 (5/31/17)

Topic: Communication with opposing counsel; communication with opposing party

Digest: Lawyer may ethically communicate with opposing counsel in any manner lawyer desires regardless of request of opposing counsel. But opposing counsel is not required to respond to the lawyer’s chosen method. With the prior consent of opposing counsel, a lawyer may (but is not required to) send to opposing counsel’s client copies of written communications to opposing counsel.

Rules: 1.2(e), 1.4(a)(3), 4.2(a) & (c)

FACTS

1. The inquirer is representing himself in a litigated matter. Opposing counsel has advised the inquirer not to communicate with him by telephone, but rather to communicate with him only in writing, and has instructed the inquirer that all emails and writings sent to opposing counsel by the inquirer should be copied to the opposing party.

QUESTIONS

2. The inquirer asks two questions:
- A. Must a lawyer abide by opposing counsel’s direction that the lawyer not communicate with him by telephone?
 - B. May or must a lawyer a lawyer comply with opposing counsel’s direction to send copies of all emails and other writings to opposing counsel’s client?

OPINION

3. As to opposing counsel’s direction not to communicate by telephone, no provision in the Rules of Professional Conduct (the “Rules”) mandates how lawyers must communicate with each other. Nor does any provision in the Rules either prohibit a lawyer from placing a telephone call to opposing counsel or require opposing counsel to accept a telephone call from another lawyer. Common sense dictates that lawyers, as members of an honorable profession, should work out between themselves the methods of communication that will best facilitate resolution of the matter at hand. In this era, email in many instances is the most efficient mode of communication.

4. As to opposing counsel’s instruction to copy opposing counsel’s client on every written

communication to opposing counsel, Rule 4.2(a), sometimes called the “no-contact” rule, provides:

(a) In representing a client, a lawyer shall not communicate . . . about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

5. Rule 4.2(c) makes clear that this prohibition applies when a lawyer is representing himself *pro se*:

(c) A lawyer who is acting *pro se* . . . in a matter is subject to paragraph (a), but may communicate with a represented person . . . provided the lawyer . . . gives reasonable advance notice to the represented person’s counsel that such communications will be taking place.

See also Comment [12A] to Rule 4.2 (“When a lawyer is proceeding *pro se* in a matter . . . , the lawyer’s direct communications with a counterparty are subject to the no-contact rule, Rule 4.2.”)

6. Thus a lawyer may not communicate with a party the lawyer knows to be represented by counsel without the prior consent of the represented party’s counsel or without giving the notice required by Rule 4.2(c). Here, however, the opposing party’s counsel has directed the lawyer to send copies of communications to the opposing party, thus furnishing the prior consent required by Rule 4.2(a). *See also* Rule 1.2(e) (“A lawyer may exercise professional judgment to . . . accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.”)

7. That still leaves the question whether the lawyer is *required* as opposed to *permitted* to send copies to the represented client. We find nothing in the Rules that require a lawyer to communicate with opposing counsel’s client. It is not the lawyer’s responsibility to keep the opposing counsel’s client “informed about the status of the matter” as required by Rule 1.4(a)(3). That is opposing counsel’s obligation under that Rule. *See* N.Y. State 1076 ¶4 (2015) (“A lawyer is required to communicate regularly with the client on the status of the matter for which the lawyer has been retained. . . . Rule 1.4(a)(3) requires the lawyer to keep the client reasonably informed about the status of the matter.”).

CONCLUSION

8. A lawyer may communicate with opposing counsel in any manner he chooses, including by telephone, regardless of the instructions of opposing counsel. But opposing counsel is not required to respond to the lawyer’s chosen method. With the prior consent of opposing counsel, a lawyer may (but is not required to) send to opposing counsel’s client copies of written communications to opposing counsel.

(17-17)